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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

UNITED TECHNOLOGIES INTERNATIONAL, INC.,
P & W COMMERCIAL ENGINE BUSINESS,

Petitioner,

—v.—

MALEV HUNGARIAN AIRLINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. § 1782 require the district courts, upon application of a foreign party to proceedings pending abroad, to order the foreign applicant's American party-opponent to submit to U.S. discovery procedures, where the American party is subject to the jurisdiction of the foreign tribunal and has committed to produce all documents and witnesses called for by that tribunal, the foreign party has made no showing of need for collateral proceedings in this nation's courts and the foreign party will not itself be subject to U.S. discovery procedures?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption.

The following information is provided pursuant to Rule 29.1 of the Court: Petitioner United Technologies International, Inc., P & W Commercial Engine Business is a division of United Technologies International, Inc., a wholly owned subsidiary of United Technologies Corporation. United Technologies Corporation's common stock is publicly held. United Technologies International, Inc. has no subsidiaries that are not wholly owned subsidiaries or indirect wholly owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	vi
PETITION	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Proceedings In The District Court	4
B. The Court Of Appeals' Decision	6
C. The Hungarian Court's Rulings	8
REASONS FOR GRANTING THE WRIT	10
POINT I	
THE COURT OF APPEALS' DECISION CONFLICTS WITH SECTION 1782'S TEXT AND PURPOSE	10
A. Section 1782 Provides Discovery Assistance Only Where Necessary	10
B. Section 1782 Requires That Discovery Assistance Be Equitable	13

PAGE

POINT II

THE COURT OF APPEALS' RULING CONFLICTS WITH DECISIONS OF THE THIRD AND ELEVENTH CIRCUITS BY DISREGARDING SECTION 1782'S INTERNATIONAL COMITY CONCERNS 16

POINT III

THE COURT OF APPEALS' RULING WOULD BURDEN THE FEDERAL COURTS, PENALIZE AMERICAN NATIONALS INVOLVED IN INTERNATIONAL DISPUTES, AND ADVERSELY AFFECT SUBSTANTIAL FEDERAL POLICIES FAVORING INTERNATIONAL ARBITRATION.. 19

CONCLUSION 22

TABLE OF APPENDICES

PAGE

Appendix A:

Opinion of the United States Court of Appeals for the Second Circuit, dated May 5, 1992, in *Malev Hungarian Airlines v. United Technologies International, Inc., Pratt & Whitney Commercial Engine Business (In re Malev Hungarian Airlines)*, No. 91-7949* 1a

Appendix B:

Opinion of the United States District Court for the District of Connecticut, dated September 30, 1991, in *In re Malev Hungarian Airlines*, No. 91-73X 21a

Appendix C:

Order of the United States Court of Appeals for the Second Circuit, dated June 26, 1992, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc in *Malev Hungarian Airlines v. United Technologies International, Inc., Pratt & Whitney Commercial Engine Business (In re Malev Hungarian Airlines)*, No. 91-7949 ..... 24a

Appendix D:

Letter from Neil P. Coughlan, Reid & Riege, to District Court Judge T. Emmet Clarie, dated May 15, 1992..... 26a

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* On May 11, 1992, the Second Circuit amended its opinion to identify additional counsel of Respondent Malev Hungarian Airlines; the opinion of the court was otherwise unchanged.

TABLE OF AUTHORITIES

Cases: PAGE

In re Application of Sumar, 123 F.R.D. 467 (S.D.N.Y. 1988)..... 12

In re Asta Medica, No. CIV. 91-328-P-H, 1992 WL 119080 (D. Me. May 22, 1992).....18, 21

In re Court of the Comm'r of Patents for the Republic of S. Afr., 88 F.R.D. 75 (E.D. Pa. 1980)..... 17

In re Letter Rogatory from the Justice Ct., Dist. of Montreal, Can., 523 F.2d 562 (6th Cir. 1975)..... 12

In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976) 12

In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 117 F.R.D. 177 (S.D. Fla. 1987), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)..... 14

In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) 11, 17

In re Request for Judicial Assistance from the Seoul Dist. Crim. Ct., Seoul, Korea, 555 F.2d 720 (9th Cir. 1977)..... 12

In re Request for Judicial Assistance from the Tribunal Civil de Port-Au-Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987)..... 12

John Deere, Ltd. v. Sperry Corp., 754 F.2d 132 (3d Cir. 1985) 13, 17

Lo Ka Chun v. Lo To, 858 F.2d 1564 (11th Cir. 1988).....12, 17

PAGE

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 21

Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987).....14, 15

Suarez-Valdez v. Shearson Lehman/Amer. Express, Inc., 858 F.2d 648 (11th Cir. 1986) 16

Statutes and Rules:

28 U.S.C. § 1782 (1988).....*passim*

Fed. R. Civ. P. 26 .....7, 16, 17, 19, 20

Pub. L. No. 85-906, 72 Stat. 1743 (1958) 11

Legislative History and Other Materials:

S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782 .....13-14, 15

Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650 (1965) 15

Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in the United States of America*, 32 J.B.A.D.C. 24 (1965)..... 11

Brian Eric Bomstein and Julie M. Levitt, Comment, *Much Ado About 1782: A Look At Recent Problems With Discovery In The United States For Use In Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. Miami Inter-Am. L. Rev. 429 (1989)..... 16-17

Morris H. Deutsch, Comment, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal*, 5 B.C. Int'l & Comp. L. Rev. 175 (1982) 11

PAGE

Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015 (1965)..... 20

The Committee on Arbitration, Ass'n of the Bar of the City of N.Y., *The Use of Discovery in Arbitration*, 33 The Record 231 (1978)..... 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner United Technologies International, Inc., P & W Commercial Engine Business ("Pratt"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 5, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 1a)[1] is reported unofficially at 1992 WL 95774 and 1992 U.S. App. LEXIS 9828 (2d Cir. May 5, 1992) (Oakes, C.J.; Feinberg, J., dissenting). The opinion of the District Court for the District of Connecticut (Clarie, J.), which denied the international discovery petition of Malev

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1 "Pet. App." refers to the appendix filed with this petition for a writ of certiorari.

Hungarian Airlines ("Malev") (Pet. App. 21a) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 5, 1992. Pratt's petition for rehearing was denied on June 26, 1992. Pet. App. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case applies 28 U.S.C. § 1782 (1988), which provides:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the place and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

STATEMENT OF THE CASE

Malev ("Respondent"), the state-owned national airline of Hungary, sought an order from the district court in Connecticut to compel Pratt ("Petitioner") to engage in American-style discovery proceedings in connection with a commercial litigation brought by Pratt against Malev in the courts of Hungary.[2]

Malev initiated its proceeding in Connecticut to obtain discovery from Pratt under section 1782 without having first sought any order from the Hungarian court responsible for adjudicating the dispute, and without showing any need for collateral proceedings between the parties in an American court. Pratt had submitted itself to the orders of the Hungarian court by filing its complaint in that court, and thereafter committed to Malev that it would produce in Hungary all documents and witnesses, wherever in the world located, that

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2 The underlying litigation in Hungary arises from Malev's breach of its agreement to purchase Pratt aircraft engines to power two wide-body aircraft to be ordered by Malev. On July 23, 1991, Pratt commenced a lawsuit against Malev in Hungary seeking a declaration that the contract for the sale of Pratt engines to Malev is binding and enforceable. Pet. App. 13a. On January 10, 1992, the Hungarian trial court ruled in Pratt's favor on the merits, finding that "a contract has been concluded between [Pratt] and [Malev]." Partial Judgment of Jan. 10, 1992, Dkt. No. 3.G.50.289/1991/32, Metropolitan Court of Budapest 1, 1 (Hung.) (certified English translation) (hereafter "Hungarian Court Judgment") (submitted by Pratt with a letter to each member of the appellate panel of the United States Court of Appeals for the Second Circuit, dated April 13, 1992, from Robin A. Henry, Esq.). The Hungarian Court Judgment was designated "partial" because it reserved for further proceedings Pratt's entitlement to legal fees. *Id.* at 25.

were required to be produced by the Hungarian court. (C.A. App. at A-177);[3] Pet. App. 22a.

Section 1782 vests discretion in the federal district courts to aid foreign tribunals and litigants in foreign proceedings to obtain evidence located in the United States that is useful in the foreign dispute. The legislative history makes clear that section 1782 was intended to be utilized where the intervention of an American court presents a necessary, equitable and efficient means to obtain the evidence. As a result, "[t]he section is generally used to seek limited amounts of evidence (commonly bank records) from third parties in this country not subject to the jurisdiction of the foreign court." Pet. App. 19a (Feinberg, J., dissenting). Section 1782 was not intended to require one-sided discovery of the American party to a foreign dispute without any showing of need.

A. The Proceedings In The District Court

On September 16, 1991, without having made any requests for information in the Hungarian court, Malev brought an order to show cause in the United States District Court for the District of Connecticut seeking extensive United States-style discovery from Pratt under section 1782. C.A. App. at A-118, A-131, A-144. Malev asked the district court to order Pratt to produce eighteen groups of documents, including every document in Pratt's files concerning (a) any engine contract it has with the national airlines of Yugoslavia and Romania; (b) Pratt's efforts to sell engines to the airlines of Poland, Czechoslovakia and the Soviet Union; and (c) Pratt's development of a jet engine for the Eastern European air travel market. Malev also requested that the district court order five witnesses employed or associated with Pratt to appear for deposition by Malev's lawyers. Pet. App. 14a; C.A. App. A-118, A-131. The deposition list included the Chairman of

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3 "C.A. App." refers to Appellant Malev's Appendix on Appeal in the United States Court of Appeals.

Pratt's parent company, United Technologies Corporation.[4] Pet. App. 14a.

The district court held argument on Malev's order to show cause on September 26, 1991. Shortly before and during the course of the hearing, Malev addressed the apparent unfairness of its proposed one-sided discovery of Pratt by agreeing to engage in reciprocal discovery. C.A. App. at A-214, A-275-277. The discussion at the hearing focused in part on the practical difficulties involved in a United States court supervising such bilateral discovery between the parties to a dispute pending in a foreign court. C.A. App. at A-267-269, A-275-276 (inability of U.S. court effectively to sanction foreign entity for non-compliance with discovery order where U.S. court has no control over underlying litigation).

On September 30, 1991, the district court denied Malev's request for discovery under section 1782. The court considered Malev's request to use American discovery procedures to be "premature and unnecessary" in part because Malev had never made its discovery requests of Pratt in the Hungarian proceeding. Pet. App. 22a. The court specifically found that "discovery procedures are fully available to litigants in Hungary" and that the court had no reason to doubt that Malev could "obtain the relevant information it seeks through Hungarian procedures."[5] *Id.* The district court also held that its involvement in the foreign litigation between the parties would result in "significant reciprocal discovery problems." *Id.* In light of this lack of need for the involvement of an American court, and noting the absence of a request for

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4 Malev made no effort to justify its attempt to depose United Technologies Corporation's Chairman, other than its contention—based solely on a newspaper article regarding defense procurement practices in the United States—that he "may be able to provide information with respect to Pratt['s] practices in seeking to influence government employees . . ." in Hungary. C.A. App. at A-15.

5 Pratt reiterated to the district court its willingness to comply with all orders of the Hungarian Court regarding the production of documents and testimony, wherever in the world the information or witnesses in its control might be located. C.A. App. A-159, A-271.

assistance from the Hungarian court, the district court denied Malev's request. Pet. App. 23a.

B. The Court Of Appeals' Decision

The Second Circuit reversed in a divided opinion, holding that the district court had abused its discretion by erecting "extra-statutory barriers to obtaining discovery" by resting its denial in part upon Malev's failure to submit its discovery request in the first instance to the Hungarian court. Pet. App. 7a-8a. The court of appeals concluded that neither the text nor the legislative history of section 1782 supported what it characterized as a "quasi-exhaustion" requirement articulated by the district court. Pet. App. 6a. The majority also concluded that the district court erred in considering the "reciprocal discovery problems" it found would arise were it to grant Malev's request and supervise bilateral discovery proceedings in a litigation for which it had no adjudicatory responsibility and over which it had no supervisory control. The court of appeals found that section 1782 did not authorize the district court to consider whether Pratt could pursue similar discovery against Malev, or whether such one-sided discovery would prejudice Pratt in the Hungarian litigation. Pet. App. 9a-10a.

The court of appeals acknowledged the district court's concern that granting Malev's petition could impose heavy burdens on the federal courts by making United States discovery procedures available as a matter of course to foreign litigants against their American adversaries. Nonetheless, the court of appeals declared, despite the permissive phrasing of the statute's text, that this was a "policy choice[ ]" of Congress that the courts were "not at liberty to second-guess. . . ." Pet. App. 7a. To lessen the court's burden, the majority ruling suggested that the district court could consider on remand using its authority under Fed. R. Civ. P. 26. to limit the *scope* of discovery:

> Pursuant to these provisions, the district court could require Malev to prepare a discovery plan, make a show-

> ing that the discovery is "not obtainable from some other source that is more convenient, less burdensome, or less expensive," such as the Hungarian court, and then require Malev to take the discovery plan before the Hungarian court for a determination as to which requests are relevant before coming to the United States district court for actual discovery.

Pet. App. 11a.

In dissent, Judge Feinberg emphasized the key distinction between this case, involving discovery by one party litigant of another, and the typical application of section 1782 to obtain evidence from a non-party witness outside the foreign tribunal's jurisdiction. Pet. App. 19a. Noting that the majority's opinion "appears to be the only reported decision requiring a United States court generally to supervise imposition of United States procedures with respect to evidence that is all subject to the jurisdiction of the foreign court," Pet. App. 12a, the dissent forecast severe burdens on the federal courts arising from the need to supervise discovery proceedings in disputes pending abroad "if the majority opinion stands." *Id.*

Concluding that the majority had misconstrued the statute by applying it without regard to its purpose, Judge Feinberg reasoned that the statute embodies a grant of discretion to the district courts, using the word "may" in its text, and that the Connecticut district court's reasons for rejecting Malev's application were an appropriate exercise of that discretion. Pet. App. 16a-19a. In particular, he found that the "quasi-exhaustion" requirement criticized by the majority had not been applied "mechanically" but instead reflected "Malev's failure to show any need for invoking section 1782." Pet. App. 17a-18a. Judge Feinberg also dissented from the majority's disapproval of the district court's reference to the problems of reciprocal discovery posed by Malev's application:

> Can it seriously be urged, in the face of [Malev's offer of bi-lateral discovery], that a United States litigant in a foreign proceeding should be subjected to United States-

> style discovery but at the same time obtain only the discovery that the foreign system grants? Fairness, in view of Malev's offer, suggests otherwise. Judge Clarie was absolutely right to be concerned about supervising such discovery and the complications that might ensue.

Pet. App. 18a-19a.

In sum, the dissent rejected Malev's interpretation of section 1782:

> Malev's position, in effect, is that section 1782 can be used as a matter of right against party litigants to supplant foreign procedures with discovery under United States rules, supervised by heavily burdened United States courts, any time a litigant is subject to the jurisdiction of this country's courts. I do not believe that this is the law.

Pet. App. 20a.

C. The Hungarian Court's Rulings

After initiating its American discovery proceeding, Malev advised the Hungarian court that it was attempting to obtain information from Pratt in proceedings in the United States. The Hungarian court expressed indifference to the manner in which Malev obtained its evidence. C.A. App. A-218. Thereafter, once the Connecticut court denied its petition, Malev requested the Hungarian court to obtain comparable information from Pratt. The Hungarian court then considered Malev's requests, and rejected them. It held that Malev's requests were "irrelevant," "unnecessary" and "unprecedented." In pertinent part, the Hungarian court's decision reads as follows:

> The court also denied Defendant's motion to oblige the Plaintiff to attach the translations of its contracts concluded with ANA Japanese Airlines and Indian Airlines. The court estimated the review of these contracts *irrelevant* from the point of view of the present case. Likewise, the court refused Defendant's motion to conduct

> evidence with respect to the circumstances under which the letter of December 21, 1990 signed by Defendant's General Manager and CEO came into existence. The court deemed such evidence *unnecessary* and held the interpretation of the letter its own duty, which it did according to the aforementioned. In possession of a definite, written statement the court held the accompanying circumstances of the signature *irrelevant*. The court found that motion of Defendant *unprecedented* in its practice and also *irrelevant* with respect to the present case which aimed at the court's taking a statement of the Plaintiff about its purpose with the present declaratory suit. The fact that Plaintiff's purpose with respect to the present lawsuit as well as its second step planned is not clear before the Defendant cannot serve as a reason to such examination.

Hungarian Court Judgment at 53-54 (emphasis supplied).[6]

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6 The Hungarian court issued its ruling while Malev's appeal was *sub judice* in the Second Circuit. In response to a suggestion by Pratt that the appeal should be dismissed as moot in light of the Hungarian court's ruling, Malev argued that the discovery sought in the United States was still relevant inasmuch as the Hungarian Supreme Court, to which Malev filed an appeal, could consider new evidence. The Second Circuit's subsequent opinion notes the existence of the Hungarian trial court's January 10 ruling in a footnote. Pet. App. 11a-12a.

Following the Second Circuit's ruling, Malev advised the district court that it would defer returning to that court until after it had obtained leave of the Hungarian Supreme Court to return to the Hungarian trial court to obtain a ruling upon the relevance of its proposed discovery plan. Thereafter, Malev advised it "would then make an application directly to the [Connecticut district court] for the discovery materials judged relevant" by the Hungarian court. Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT OF APPEALS' DECISION CONFLICTS WITH SECTION 1782'S TEXT AND PURPOSE

A litigant in a foreign proceeding has no apparent need to seek discovery of its opponent in a collateral action in the United States where, as here, the opponent has submitted itself to the full jurisdiction of the foreign tribunal. Accordingly, the district court in this case ruled that absent something more—such as a showing that efforts to obtain the information in the primary forum had been unsuccessful, or a direct request from the foreign tribunal—the foreign litigant's effort to embroil its opponent in collateral discovery proceedings should be rebuffed.

In reversing the district court's straightforward application of section 1782, the court of appeals' decision conflicts with the text and evident purpose of section 1782 to provide assistance to foreign and international tribunals and litigants only where such assistance is necessary, equitable, efficient, and consistent with notions of international comity. Moreover, the Second Circuit's decision may not be squared with those of other courts of appeals, as shown in Point II below. As discussed in Point III below, the Second Circuit's requirement that section 1782 discovery be made available by the district courts as a matter of right to one party to a foreign dispute against its American opponent works dramatic mischief on the federal courts and on American parties to foreign proceedings.

A. Section 1782 Provides Discovery Assistance Only Where Necessary

Section 1782 provides that the district court "*may* order" discovery from a person residing within its district, and that such an order "may be made . . . upon the application of any interested person." 28 U.S.C. § 1782 (emphasis added). The permissive language of the statute lodges discretion over

the petition in the district court. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). The legislative history clearly demonstrates Congress' intent that section 1782 discovery should be allowed only where the district courts determine that there is a need for their intervention to aid the foreign proceeding. The court of appeals' opinion reads the word "may" out of the statute by requiring that a district court grant a section 1782 petition even where the assistance sought is unnecessary.

Although section 1782 was enacted in 1964, its legislative history begins in 1958, when Congress created the Commission on International Rules of Judicial Procedure. The Commission was instructed to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements," and to "draft and recommend to the President any necessary legislation." Pub. L. No. 85-906, 72 Stat. 1743 (1958). The Commission was charged with recommending reforms to make "more readily ascertainable, efficient, economical, and expeditious" the "procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id.* The Commission transmitted a proposed bill to the Congress on May 28, 1963, following approval by the Administration, which included a provision to amend section 1782 to its current text.

The reforms of section 1782 were intended to expand the availability of federal courts to assist foreign and international courts and other interested parties in taking discovery of American nationals where other means of discovery were inadequate. As explained by Philip Amram, the Chairman of the Commission, section 1782(a):

> provides judicial assistance by the district courts where voluntary testimony or production fails or is *inadequate* and where compulsion of the witness is *needed.*

Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance*

in the United States of America, 32 J.B.A.D.C. 24, 30 (1965) (emphasis supplied); *see* Morris H. Deutsch, Comment, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal*, 5 B.C. Int'l & Comp. L. Rev. 175, 178 (1982) ("The procedures of Section 1782 apply only when an individual possessing sought-after evidence is uncooperative.").

Accordingly, the district court properly sought some showing of need from Malev before agreeing to order United States discovery proceedings against Pratt, its party-opponent in the Hungarian court proceeding. Since Malev never made its discovery requests before the Hungarian court, and Pratt represented that it would comply with any orders of that court, the district court concluded that Malev had demonstrated no need for collateral discovery proceedings in the United States. In rejecting the district court's ruling in these circumstances, the Second Circuit eliminated "need" as an appropriate factor in the exercise of discretion under the statute. Yet essentially all other reported applications of the statute to date involved grants of *necessary* assistance, consistent with the district court's ruling.[7] As the dissent below

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7 *See, e.g., Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988) (discovery ordered of non-party witnesses to a Hong Kong action resident in the United States); *In re Request for Judicial Assistance from the Seoul Dist. Crim. Ct., Seoul, Korea*, 555 F.2d 720 (9th Cir. 1977) (production of records ordered of American bank not a party to the proceedings in Korea to which the records were relevant); *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1218 (9th Cir. 1976) (subpoenas issued to "witnesses [who were] not the subjects of the" foreign proceeding); *In re Letter Rogatory from the Justice Ct., Dist. of Montreal, Can.*, 523 F.2d 562 (6th Cir. 1975) (seeking records from an American bank that was not before the foreign tribunal); *In re Application of Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988) (same); *In re Request for Judicial Assistance from the Tribunal Civil De Port-Au-Prince, Republic of Haiti*, 669 F. Supp. 403 (S.D. Fla. 1987) (same).

Indeed, the one case noted by the appellate court to support its rejection of the district court's purported "exhaustion" requirement in fact

observed, "there is no indication, either in the text or the legislative history of section 1782, that Congress intended the statute to be used for anything other than to provide information *necessary* to foreign litigation but *beyond the power of the foreign court.*" Pet. App. 18a (emphasis supplied).

B. Section 1782 Requires That Discovery Assistance Be Equitable

The district court concluded that granting Malev's request for discovery of Pratt would in fairness also require Malev to submit to discovery by Pratt, and as a result Malev's section 1782 petition would necessarily "bring with it significant reciprocal discovery problems." Pet. App. 22a. Remarkably, the court of appeals rejected any notion that discovery proceedings need be fair or equitable under section 1782. Instead, it held that the lack of fairness of one-sided discovery of Pratt was not a proper basis upon which to deny a section 1782 petition. Pet. App. 9a-10a. This conclusion is at odds with the intended purpose of section 1782 as well as the fundamental values of the federal discovery process.

Congress' interest in enacting section 1782 was to promote only discovery procedures that are "equitable". In the transmittal letter submitted by the Commission in support of the proposed legislation, the Chairman of the Commission expressed hope that the proposed legislation would

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illustrates an appropriate disposition of a section 1782 petition directed against an American party to a foreign litigation by its adversary. In *John Deere, Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985)—the only case cited by the majority in which a section 1782 application had been brought by one party to a foreign litigation against another—the Third Circuit granted the section 1782 application to take the deposition of a witness whom the Canadian court had determined was outside its jurisdiction, while affirming the district court's dismissal of the application with regard to a second witness over whom the Canadian court had asserted jurisdiction. *Id.* at 137-38.

> provid[e] *equitable* and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793 (emphasis added). The Senate Judiciary Committee in its report on the legislation adopted identical language to express its intent: to "provid[e] *equitable* and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." *Id.* at 3783 (emphasis supplied). *See In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 117 F.R.D. 177, 180 (S.D. Fla. 1987), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (ordering section 1782 document production where it did not "conflict with our concept of fundamental fairness and due process"). It is noteworthy that in paraphrasing the transmittal letter and committee report, in three separate passages in its ruling, the Second Circuit makes no reference to the interest in "equitable" procedures and instead describes only the goal of efficiency. Pet. App. 4a-5a, 6a, 7a.

The inequitable one-way discovery authorized by the court of appeals under section 1782 conflicts not only with the plain legislative intent but also with the federal courts' strong policy favoring fair and even-handed discovery proceedings. In *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987), this Court explicitly rejected an inequity directly comparable to that which the court of appeals concludes is permitted by section 1782. As observed there:

> [T]he foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all relevant facts gathered by both parties is essential to proper litigation." . . .

> Second, a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures . . . .

482 U.S. at 540 n.25 (citation omitted).

The Second Circuit makes no reference to *Société Nationale*. The only reason it proffers for its extraordinary ruling is the inapposite proposition that the statute was intended to "provide an avenue for judicial assistance to foreign or international tribunals whether or not reciprocal arrangements existed." Pet. App. 9a-10a. Yet there can be no dispute that the "reciprocity" viewed as unnecessary in the legislative history is that between nations, not between parties to a specific litigation. Congress enacted section 1782 in part to set an example for the world by reducing this nation's barriers to judicial assistance for foreign proceedings, in the hope that it would "invite foreign countries similarly to adjust their procedures." S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3783; *see also* Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651-52 (1965) ("reciprocity" refers to "each country[ ] enacting internal legislation parallel to Public Law 88-619" according to Commission Chairman).

That Congress intended to provide assistance for nations that had not yet authorized analogous assistance for American courts and litigants in no way suggests that it intended to disadvantage American litigants abroad by subjecting them to unilateral discovery by their foreign adversaries. By forbidding a district court from considering the lack of fairness to a party in exercising its discretion under section 1782, the majority's ruling flouts the purpose of the statute.[8]

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8 The court of appeals also held that the district court's order imposed improper burdens on foreign litigants and was therefore inconsistent

POINT II

THE COURT OF APPEALS' RULING CONFLICTS WITH DECISIONS OF THE THIRD AND ELEVENTH CIRCUITS BY DISREGARDING SECTION 1782'S INTERNATIONAL COMITY CONCERNS

The court of appeals' decision requires the district courts to supplant the rules of foreign tribunals by granting American-style discovery under section 1782 even where such procedures are unavailable or offensive to the foreign tribunal in charge of the case. That result derives not only from the Second Circuit's rejection of the district court's attempt to avoid conflict with the Hungarian court, but also from the court of appeals' express transformation of the decision to be made by the trial judge under the statute into one governed exclusively by Rule 26, Fed. R. Civ. P. The various criteria in that Rule do not expressly incorporate notions of international comity. To the contrary, Rule 26 is a broad grant of discovery power that presumes the desirability of discovery. Yet the rules of many civil law nations[9] (and of most international arbitral forums) prohibit pre-trial discovery.

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with section 1782's promotion of efficient means of international assistance. Pet. App. 7a. Yet the district court's ruling provides a far more efficient procedure than the cumbersome procedures suggested by the court of appeals. Pet. App. 11a. The district court was more sensitive than the appellate court to the inefficiencies created by the obligation of a trial judge to supervise party discovery in a case pending in a different and distant forum. *See Suarez-Valdez v. Shearson Lehman/Amer. Express, Inc.*, 858 F.2d 648, 850 (11th Cir. 1986) (concurrence) (describing practical difficulties where judge is required to supervise discovery but has no adjudicatory responsibility over the underlying claims).

9 "In civil law systems, 'evidence-gathering for civil litigation is a judicial function . . . . [and] [t]he taking of evidence by private persons . . . or U.S. government officials . . . is considered an infringement on an area of exclusive judicial sovereignty, in some cases even where taken from a willing witness.' " Brian Eric Bomstein and Julie

This potential intrusion upon the orderly progress of a foreign proceeding clearly threatens the important principles of international comity which underlie section 1782. *See John Deere, Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985) ("a grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782" because it would violate "considerations of comity"). Significantly, the Second Circuit's opinion fails to make any effort to reconcile its ruling with the principle clearly articulated by the Third and Eleventh Circuits that section 1782 does not permit a foreign litigant to make an "end run" around the rules of foreign tribunals that restrict discovery. *John Deere* at 136 ("Our decision does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals"); *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (" 'the district court must decide whether the evidence would be discoverable in [the] foreign country before granting assistance' ") (emphasis omitted) (quoting *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)); *In re Court of the Comm'r of Patents for the Republic of S. Afr.*, 88 F.R.D. 75, 77 (E.D. Pa. 1980) (court notes importance that information requested be "discoverable under South African law").

M. Levitt, Comment, *Much Ado About 1782: A Look At Recent Problems With Discovery In The United States For Use In Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. Miami Inter-Am. L. Rev. 429, 441 n.52 (1989) (citations omitted). Moreover, Rule 26(c), to which the court of appeals points in part, places the burden on the party from whom discovery is sought to justify "for good cause shown" why a protective order limiting discovery is proper. However appropriate that result may be when applied to a witness in the United States who is not a party to the foreign dispute and is not subject to the jurisdiction of the foreign tribunal, nothing in section 1782 suggests that such a burden was intended to be placed upon an American party to the foreign litigation from whom discovery is sought in ancillary proceedings in the United States. Section 1782 was not intended to create a presumption that United States discovery is available in favor of one party to a foreign proceeding against its adversary.

But see In re Asta Medica, No. CIV. 91-328-P-H, 1992 WL 119080 (D. Me. May 22, 1992) (authorizing section 1782 discovery where discoverability abroad is disputed, in partial reliance upon the Second Circuit's ruling in this case).

Those decisions reject the use of section 1782 to authorize American-type discovery where such procedures are unavailable in, or offensive to, the rules of the foreign forum where the dispute between the parties is pending. A district court runs afoul of that important limitation if it entertains—without any showing of need or consultation with the foreign tribunal—a collateral action between the parties to a foreign litigation that effectively imposes American-style discovery procedures on the foreign proceeding. The district judge in this case promoted the comity objectives of section 1782 by requiring Malev to establish that a second proceeding between the same parties, in a courtroom in the United States, was necessary and appropriate under the rules of the foreign forum, and not an unwelcome intrusion upon the rules and supervisory authority of a foreign court.[10] By rejecting this objective as an improper "extra-statutory barrier" to section 1782 discovery assistance, the decision of the Second Circuit conflicts with the interpretation of section 1782 of other courts of appeals. That conflict should be resolved by this Court in favor of promoting the very international comity concerns that led to the enactment of section 1782.

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10 This concern would not arise in the typical section 1782 petition, in which the American national from whom discovery is sought is not a party to the foreign proceeding or the information sought is otherwise outside the foreign court's jurisdiction. In such circumstances, section 1782 properly provides discovery assistance to either a foreign litigant or a foreign tribunal by extending and supplementing (and not intruding upon) the foreign procedures. Here, the district court recognized that where both Malev and Pratt were subject to the procedures and jurisdiction of the Hungarian court, its assistance was presumptively unnecessary and unwanted.

POINT III

THE COURT OF APPEALS' RULING WOULD BURDEN THE FEDERAL COURTS, PENALIZE AMERICAN NATIONALS INVOLVED IN INTERNATIONAL DISPUTES, AND ADVERSELY AFFECT SUBSTANTIAL FEDERAL POLICIES FAVORING INTERNATIONAL ARBITRATION

As discussed above, the court of appeals' decision raises important issues of international relations among adjudicatory tribunals. Moreover, the opinion threatens to disadvantage American participants in international transactions. Such consequences are not called for by the statutory text and plainly thwart Congress' intent. The Second Circuit's misinterpretation of section 1782 calls for this Court's review.

First, since the opinion transforms the judicial role under the statute to one informed exclusively by Rule 26, Fed. R. Civ. P., foreign litigants engaged in disputes abroad with American nationals will likely bring section 1782 applications in the federal courts to obtain discovery against the American party as a matter of course. At the hearing on Malev's petition, the district court expressed concern about the burden on the federal courts that would result if the litigants in

> every litigation in every country of the world involving an American manufacturer or party . . . could simply come in and ask for almost unlimited disclosure and discovery . . . under the supervision of the courts of this country which would bring with it a burden beyond present contemplation.

C.A. App. A-301-302. As Judge Feinberg noted in dissent, "if the majority opinion stands," the consequences for the district courts may be severe. Pet. App. 12a. Congress never intended section 1782 to burden the federal courts with the task of routinely supervising party discovery between litigants in a foreign proceeding and supplanting the discovery procedures of the foreign tribunal.

The court of appeals' opinion also creates significant adverse consequences for American businesses caught in international disputes, placing them at a competitive disadvantage in at least two respects. By authorizing the district courts to order one-sided discovery against the American parties to foreign proceedings without assuring the fairness of such a procedure, the opinion invites foreign litigants to use American courts to obtain an unfair advantage over the American parties with whom they are litigating abroad. It also disadvantages American businesses in relation to non-Americans involved in international trade who would not be subject to the same inequitable discovery procedures in their nations. The use of section 1782 as authorized by the Second Circuit puts American business at a distinct, significant disadvantage with respect to their counter-parties in litigation and their direct competitors in the international marketplace.[11] No such penalty for American business is warranted by the text or legislative history of section 1782.[12]

In addition, the breadth of the court of appeals' ruling, as applied to international arbitrations,[13] places at risk arbitration's promise of quick, inexpensive and efficient resolution of commercial disputes arising in international transactions. In the context of international arbitrations, the language of the majority's ruling is broad enough to authorize the district courts to grant a foreign adversary's request for full American discovery from the American party to an arbitration, while the foreign entity escapes any discovery obligations

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11 Since a district court is without discretion under the Second Circuit ruling to deny a section 1782 petition outright, the American party will in each case be burdened with the expense of defending against the discovery request under the governing standards of Rule 26, which presume the availability of discovery.

12 Indeed, the Reporter of the Commission that proposed the statute that became section 1782 envisioned that, if anything, American courts would *favor* interests of American litigants in proceedings under the new statute. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1029 n.86 (1965).

13 The provisions of section 1782 apply to foreign and international arbitrations. Smit, *supra* note 12, at 1026 n.71.

whatsoever under the rules of the arbitral tribunal. American businesses may therefore refrain from agreeing to arbitration clauses in international contracts because of the prospect that in the event an arbitrable disputes arises, they alone will be subject to expensive and unfair discovery proceedings in the federal courts.[14] Consequently, the court of appeals' interpretation of the statute conflicts with "the emphatic federal policy in favor of arbitral dispute resolution" stemming from "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). There is nothing in the legislative history suggesting that Congress envisioned such a result in enacting section 1782.

Further review by this Court is also warranted because subsequent cases raising these issues are unlikely to present themselves for prompt appellate review. The reversal of the district court's ruling as an abuse of discretion is likely to lead other district courts to grant, at least on some terms, subsequent applications under the statute, *see In re Asta Medica*, No. CIV. 91-328-P-H, 1992 WL 119080 (D. Me. May 22, 1992); unless a rare stay is granted of the discovery ordered upon such applications, the losing litigant will have little opportunity to appeal and the opportunity to address this question and resolve the conflict among the circuits will be indefinitely deferred.

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14 *Cf.* The Committee on Arbitration, Ass'n of the Bar of the City of N.Y., *The Use of Discovery in Arbitration*, 33 The Record 231, 232 (1978) (recommending no change in arbitrators' lack of authority to order discovery, since "pre-trial discovery . . . may sharply increase costs and seriously delay determination of a dispute . . . . [And,] the desire to contain costs and avoid delay are usually the major reasons why parties elect and agree to arbitrate disputes.").

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: July 1, 1992

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 665—August Term, 1991

(Argued November 25, 1991 Decided May 5, 1992)

Docket No. 91-7949

In the Matter of the Application of

MALEV HUNGARIAN AIRLINES,

Plaintiff.

MALEV HUNGARIAN AIRLINES,

Plaintiff-Appellant,

—v.—

UNITED TECHNOLOGIES INTERNATIONAL INCORPORATED, PRATT & WHITNEY COMMERCIAL ENGINE BUSINESS,

Defendant-Appellee.

Before:

OAKES, *Chief Judge,*
FEINBERG and WALKER, *Circuit Judges.*

Appeal from an order of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Judge*, denying Malev Hungarian Airlines' request to take discovery in the United States from United Technologies International, Pratt & Whitney Commercial Engine Business, pursuant to 28 U.S.C. § 1782 (1988), for use in proceedings before a Hungarian court. Reversed and remanded.

Judge Feinberg dissents in a separate opinion.

ROBERT C. BATA, New York, NY (Jay P. Mayesh, Stroock & Stroock & Lavan, New York, NY; Neil P. Coughlan, Reid & Reige, Hartford, CT, of counsel), *for Plaintiff-Appellant*.

SCOTT P. MOSER, Hartford, CT (Day, Berry & Howard, Hartford, CT; Richard F. Ziegler, Cleary, Gottlieb, Steen & Hamilton, New York, NY, of counsel), *for Defendant-Appellee*.

OAKES, *Chief Judge*:

Malev Hungarian Airlines ("Malev") appeals from an order entered in the United States District Court for the District of Connecticut on September 30, 1991, T. Emmet Clarie, *Judge*, denying Malev's request to take discovery from United Technologies International, Inc., Pratt & Whitney Commercial Engine Business ("Pratt & Whitney"), pursuant to 28 U.S.C. § 1782 (1988), for use in

proceedings before a Hungarian court. Because the district court relied on improper factors in denying Malev's discovery request, we reverse and remand.

I.

On July 23, 1991, Pratt & Whitney, an airplane engine manufacturer, filed a complaint in the Municipal Court of Budapest, Hungary against Malev, the Hungarian national airline. In the complaint, Pratt & Whitney seeks specific performance of an alleged multi-million dollar December 1990 agreement by Malev to purchase a number of PW4000 jet engines from Pratt & Whitney in connection with the modernization of Malev's fleet of aircraft.

On September 16, 1991, four days after Malev filed its answer in the Hungarian court, Malev initiated this action in the United States District Court for the District of Connecticut. Malev requested that the district court enter an order pursuant to 28 U.S.C. § 1782 permitting discovery of Pratt & Whitney by Malev in the United States. In particular, Malev seeks to depose a number of individuals located in Connecticut who hold various positions with Pratt & Whitney and to obtain eighteen groups of documents purportedly relevant to the litigation in Hungary.

On July 30, 1991, following a hearing on the matter, the district court entered an order denying Malev's request for discovery under 28 U.S.C. § 1782.

We review the district court's decision to deny Malev's request for assistance for an abuse of discretion. *See Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1565-66 (11th Cir. 1988); *In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea*, 555 F.2d 720, 723-24 (9th Cir. 1977).

II.

A.

The genesis of 28 U.S.C. § 1782 (1988)[1] sheds light on the policy aims which Congress sought to effectuate by enacting the legislation. In 1958, Congress created the Commission on International Rules of Judicial Procedure and instructed it to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Pub. L. No. 85-906, 72 Stat. 1743 (1958). The Commission was further told to use that investigation and study as a basis upon which to "draft and recommend to the President any necessary legislation" to render "more readily ascertainable, efficient, economical, and expeditious" the "procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id.*

On May 28, 1963, the Commission transmitted a proposed bill to the Speaker of the House of Representatives and the President of the Senate, following approval by the Administration, which included a provision to amend 28 U.S.C. § 1782 to its current version. In the transmittal letter, which the Senate Judiciary Committee included in its report on the bill, the Chairman of the Commission explained its hope that enactment of the proposed legislation would provide efficient means of assistance in our federal courts for litigants involved in international liti-

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1 28 U.S.C. § 1782(a) (1988) provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .

gation and would prompt foreign courts to follow our generous example and provide similar assistance to our court systems. S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3792-94;[2] *see also In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 564-66 (6th Cir. 1975).

The Senate Judiciary Committee agreed with the Commission's understanding of the intent behind the legislation and explained in its report:

> Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

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2 The letter provides in pertinent part:

> Enactment of the proposed bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.
>
> The Commission hopes that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures. . . . Enactment of the proposed bill should encourage foreign nations to follow the example of the United States.

Id. at 3793-94.

> It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.

Id. at 3783; *see also* Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1017-19 (1965) (author, who was Reporter of the Commission on International Rules of Judicial Procedure, explaining his view of the purposes behind the legislation in virtually identical terms).

These twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts must inform our analysis of whether the district court abused its discretion by denying Malev's request for assistance in the pending litigation before the Hungarian court. To that task, we now turn.

B.

In denying Malev's request for discovery, the district court found that Malev's request was "premature and unnecessary" because Malev "never made a formal discovery request upon Pratt & Whitney before the Hungarian court." The district court concluded that discovery procedures are "fully available" to litigants in Hungary and that Malev should have first sought the requested discovery from the Hungarian court.

We find nothing in the text of 28 U.S.C. § 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court. To the contrary, the plain language of 28 U.S.C. § 1782(a) states that "upon the application of any interested person," the district court where the person from whom discovery is sought resides

"may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

Furthermore, requiring an interested person first to seek discovery from the foreign or international tribunal is at odds with the twin purposes of 28 U.S.C. § 1782 as articulated in the legislative history. It would undermine the policy of improving procedures for assistance to foreign and international tribunals by imposing an additional burden on persons seeking assistance from our federal courts for matters relating to international litigation. Additionally, it would undermine the policy of prompting foreign courts to act similarly based on our own generous example.

Finally, as far as we can discern, no other federal court has denied a direct request by a private foreign litigant for discovery pursuant to 28 U.S.C. § 1782 because the party seeking discovery has not first sought the information through the foreign or international tribunal. *See, e.g. John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 134 (3d Cir. 1985) (granting direct request for discovery from private foreign litigant where discovery had not first been sought from Canadian court).

We appreciate the district court's concern, which was expressed repeatedly during the hearing on Malev's application, that making discovery available through United States district courts to interested persons before foreign and international tribunals could potentially impose heavy burdens on our federal courts. But we are not at liberty to second-guess the policy choices of our Congress. However, we note that district courts issuing discovery orders pursuant to 28 U.S.C. § 1782 may impose conditions to minimize the compliance burdens, so long as those conditions do not impose extra-statutory barriers to obtaining

discovery such as an exhaustion requirement. *See* S. Rep. No. 1580, 88th Cong., 2d. Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("[28 U.S.C. § 1782] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable."); *see also* Section III, *infra*.

Therefore, to the extent the district court rested its decision to deny discovery to Malev because a request for discovery from Pratt & Whitney had not first been made to the Hungarian court in Budapest, we conclude that the district court abused its discretion. *See Independent Oil & Chem. Workers v. Procter & Gamble*, 864 F.2d 927, 929 (1st Cir. 1988) ("Judicial discretion is necessarily broad—but it is not absolute. Abuse occurs . . . when an improper factor is relied upon . . . .")

The district court also indicated that "[a]bsent a request from the Hungarian court to become involved in the oversight of discovery," it was denying Malev's request. We believe it was improper for the district court to predicate its denial of an application for discovery under 28 U.S.C. § 1782 on the absence of a request for assistance from the Hungarian court.

The plain language of the statute provides that "[t]he order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or upon the application of any interested person.*" 28 U.S.C. § 1782(a) (1988) (emphasis added). This language was inserted as part of the effort to liberalize the assistance provided by American courts to foreign and international tribunals.[3] By denying Malev's application in the absence

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3 The 1964 legislation which enacted the current version of § 1782 also repealed 22 U.S.C. §§ 270-270g which placed undesirable limitations on the parties who could seek assistance from United States courts in pro-

of a request from the Hungarian court, the district court read this provision out of the statute.

The legislative history, case law, and critical commentaries strongly support our conclusion that the provision indeed means what it says. S. Rep. No. 1580, *reprinted in* 1964 U.S.C.C.A.N. at 3789 ("A request for judicial assistance under the proposed revision may either be contained in a letter rogatory or other request *or be made in a direct application by an interested person, such as . . . a party to the foreign or international litigation. Subsection (a) specifically so provides.*") (emphasis added); *John Deere*, 754 F.2d at 136; Smit, *supra*, 65 Colum. L. Rev. at 1027; Comment, *Much Ado About 1782: A Look at Recent Problems with Discovery in the United States for Use in Foreign Litigation under 28 U.S.C. § 1782*, 20 U. Miami Inter-Am. L. Rev. 429, 431 (1989).

Finally, the district court indicated in its order denying Malev's request that "[t]his Court's involvement would unnecessarily complicate the case and bring with it significant reciprocal discovery problems." We are not entirely sure what the district court meant when it invoked the phrase "reciprocal discovery problems." We think it is fair to infer, however, based on the parties' submissions to the district court and the hearing transcript that the district court worried about having to supervise discovery from Malev by Pratt & Whitney in the United States as well, if it granted Malev's request in order to ensure fairness to Pratt & Whitney.

Congress intended, however, that 28 U.S.C. § 1782 would provide an avenue for judicial assistance to foreign or international tribunals whether or not reciprocal

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ceedings before international tribunals. *See* S. Rep. 1580, *reprinted in* 1964 U.S.C.C.A.N. at 3784-85.

arrangements existed. *See, e.g. John Deere*, 754 F.2d at 135; Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965) ("[28 U.S.C. § 1782] is a one-way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drawn this way . . . ."") (author was Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure). Therefore, the district court was mistaken to the extent it believed that granting Malev's request would *necessarily* require the district court to supervise discovery sought by Pratt & Whitney from Malev and it should not have predicated its decision on this belief. The district court was free to grant Malev's request without assuming responsibility for supervising Pratt & Whitney's discovery from Malev.[4]

Based on these considerations, we hold that the district court abused its discretion by relying on improper factors in denying Malev's application for discovery from Pratt & Whitney pursuant to 28 U.S.C. § 1782.

III.

On remand, we wish to note that the district court can utilize its powers under the Federal Rules of Civil Procedure to lessen significantly the burden of handling this discovery. *See* 28 U.S.C. § 1782(a) (1988) ("The [discovery] order may prescribe the practice and procedure . . . for taking the testimony or statement or producing

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4 The district court can, of course, accept Malev's offer to engage in "reciprocal discovery" which was first submitted to the district court in an affidavit in support of their petition for discovery and later reiterated in submissions to this court. Malev explained in these submissions that their offer of "reciprocal discovery" means making witnesses and documents available in the United States to the same extent Pratt & Whitney is required to do so.

the document or other thing."); *see also* S. Rep. No. 1580, *reprinted in* 1964 U.S.C.C.A.N. at 3788 ("[28 U.S.C. § 1782] leaves the issuance of an appropriate order to the discretion of the court, which, in proper cases . . . may impose conditions it deems desirable.").

Specifically, the district court retains broad authority under Fed. R. Civ. P. 26(b)(1) to limit discovery where:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the discovery is unduly burdensome or expensive . . . .

Additionally, Rule 26(c) allows the court to order:

> (2) that the discovery may be had only on specified terms and conditions . . . [and] (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters.

Pursuant to these provisions, the district court could require Malev to prepare a discovery plan, make a showing that the discovery is "not obtainable from some other source that is more convenient, less burdensome, or less expensive," such as the Hungarian court, and then require Malev to take the discovery plan before the Hungarian court for a determination as to which requests are relevant before coming to the United States district court for actual discovery.

By so doing, the district court could achieve its objective of minimizing the burdens involved with supervising Malev's discovery from Pratt & Whitney while acting within the confines of 28 U.S.C. § 1782.[5]

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5 In handling Malev's discovery request, the district court may also wish to consider the implications of a written decision of the Municipal Court of Budapest, Hungary in the underlying litigation dated January

IV.

For these reasons, the order of the district court denying judicial assistance to Malev in seeking discovery from Pratt & Whitney under 28 U.S.C. § 1782 is reversed, and the case is remanded to the district court for proceedings consistent with the foregoing determination.

FEINBERG, *Circuit Judge* (dissenting):

The surest way to misconstrue a statute, one of our greatest federal judges said, is to apply it literally without regard to its purpose. See Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945). That, I fear, is what the majority has done here, thereby creating a precedent that bodes ill for a federal judicial system that is struggling to stay afloat. This appears to be the only reported decision requiring a United States court generally to supervise imposition of United States procedures with respect to evidence that is all subject to the jurisdiction of the foreign court. As appellee points out, if the majority opinion stands, United States courts can be required to become global "Special Masters for Discovery" to supervise proceedings in any court "in the world . . . if either a litigant [in the foreign court] or its evidence can be found here." I submit that 28 U.S.C. § 1782,

10, 1992. In light of the Hungarian court's decision, the district court may conclude that discovery should be stayed until an interlocutory appeal in the Hungarian courts is resolved or that discovery should proceed immediately. We make no determination on these matters. Our holding today simply establishes that the district court abused its discretion in refusing to entertain Malev's request for discovery pursuant to 28 U.S.C. § 1782.

the statute relied on by the majority, does not require such an unwise result.

I. Background

The facts before us are simple. United Technologies International, Inc., Pratt & Whitney Commercial Engine Business (Pratt) manufactures airplane engines. In July 1991, it sued Malev Hungarian Airlines (Malev), seeking a declaratory judgment that Malev was bound by contract to purchase five of Pratt's jet aircraft engines. The lawsuit thus grows out of a garden-variety commercial dispute. Pratt sued Malev in the Municipal Court of Budapest, apparently under the assumption that it would be difficult for Malev, the Hungarian national airline, to disregard a judgment of the Hungarian court.

Four days after Malev filed its response to the complaint, without any prior request or notice to Pratt or to the court in Hungary, Malev filed a proceeding under 28 U.S.C. § 1782[1] in the United States District Court for the

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1 28 U.S.C. § 1782 provides, in relevant part:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

District of Connecticut, seeking broad, United States-type discovery from Pratt. Malev requests discovery of, among other things, every document in Pratt's files concerning (a) any engine contract it has with the national airlines of Yugoslavia and Rumania; (b) Pratt's efforts to sell engines to the airlines of Poland, Czechoslovakia and the Soviet Union; and (c) Pratt's development of its jet engine for all of Eastern Europe. Malev pressed these requests in the Connecticut district court even though Pratt is the plaintiff in the lawsuit in Hungary and is therefore subject to the full jurisdiction of that court. Malev included in its list of witnesses to be deposed the name of Robert F. Daniell, the chairman of Pratt's parent corporation, United Technologies Corporation. Malev claimed that because Mr. Daniell was linked by unnamed sources in a newspaper article to a criminal investigation of defense procurement practices by United Technologies and many other defense contractors in the United States, he should be deposed in connection with Pratt's suit against Malev in Hungary because he "may be able to provide information with respect to [Pratt's] practices in seeking to influence government employees . . . ." That request has apparently been dropped on appeal. Pratt asserts that Malev's action here and its broad requests for discovery are part of a strategy of delay and trench warfare.

This was the background of the dispute as it came before Judge T. Emmet Clarie, former Chief Judge of the Connecticut District Court and an experienced jurist. The court had before it extensive submissions from both Malev and Pratt on the propriety of using section 1782 in this context, and heard argument for more than two hours. Judge Clarie's reaction to this extraordinary proceeding was as follows:

First, the judge was concerned with the breadth of Malev's requests and with the necessary burden of super-

vising discovery. As a glimpse of what that burden might be in this fiercely-contested litigation, I note that after thorough briefing and argument in this court, the parties have continued to favor us with no fewer than 18 items of correspondence. The most notable of these includes a thick document translating a recent opinion of the Hungarian court, and there apparently has been a dispute as to the accuracy of the translation.

Second, the judge was concerned by the precedent he might set if he granted Malev's requests. Thus, he noted that

> the world is as small as the screen on your television set—as the world gets smaller, it means that every litigation in every country of the world involving an American manufacturer or party . . . could simply come in and ask for almost unlimited disclosure and discovery . . . under the supervision of the courts of this country which would bring with it a burden beyond present contemplation.

Third, the judge noted that Malev had never made a formal discovery request upon Pratt in the Hungarian court and that counsel for Pratt had represented to the district court that it would comply with any order the Hungarian court imposes. In the exercise of his discretion, the judge denied Malev's request. This appeal followed.

II. Analysis

At the outset, it should be noted that Malev has not only involved a federal district court in routine discovery matters concerning a case in the Hungarian court but has also involved this court, thereby occasioning additional delay, expense and diversion. Malev has accomplished this even though ordinary litigants unsuccessfully seeking

discovery in routine commercial cases in the district court could not achieve the same result. Such litigants, of course, would be bound by the final judgment rule, which does not countenance immediate appeals from the resolution of ordinary discovery disputes. American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280-81 (2d Cir. 1967). But since Malev's section 1782 discovery motion in effect constituted the whole of its action in the district court, our precedents appear to allow Malev's appeal from the denial of the motion. See In re Letters Rogatory Issued by the Director of Inspection, 385 F.2d 1017, 1018 (2d Cir. 1967).

Putting that consideration to one side, however, and going directly to the merits of the appeal, the issue before us is whether Judge Clarie abused his discretion in denying discovery. The statute uses the term "may," see note 1, supra, in describing the court's power to respond to a request for discovery, thus clearly lodging discretion in the district court. The cases confirm that abuse of discretion is the applicable standard. See Lo Ka Chun v. Lo To, 858 F.2d 1564, 1565-66 (11th Cir. 1988); In re Request for Assistance from Ministry of Legal Affairs, 848 F.2d 1151, 1154 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989). A party challenging a district judge's exercise of discretion "can prevail only if there was no reasonable basis for [its] decision." S.E.C. v. Bausch & Lomb Inc., 565 F.2d 8, 18 (2d Cir. 1977).

Under the applicable test, it simply cannot be said that Judge Clarie abused his discretion in denying Malev's request for discovery. Pratt brought an uncomplicated commercial lawsuit against Malev in the latter's country; Malev almost immediately brought this proceeding in this country seeking overly broad discovery; the indications were clear that this was all-out discovery warfare, which would require significant supervision by the district court;

and Malev sought information here that, if appropriately sought, could have been obtained through the Hungarian court, but Malev never sought it there. In denying discovery, Judge Clarie not only did not abuse his discretion; he clearly reached the right result.

Why, then, does the majority refuse to affirm here and insist on sending this case back to Judge Clarie for "supervising" Malev's discovery from Pratt? The reasons given are that (1) the judge told Malev first to seek the requested discovery from the Hungarian court; and (2) the judge also said that he was denying the relief sought "[a]bsent a request from the Hungarian court to become involved in the oversight of discovery." According to the majority, neither of these conditions appears in the statute and therefore neither could be a legitimate reason for denying discovery. Finally, the majority chides the district court for observing that "[t]his Court's involvement would unnecessarily complicate the case and bring with it significant reciprocal discovery problems." The majority concludes that the district court was "worried about having to supervise discovery from Malev by Pratt . . . in the United States as well, if it granted Malev's request in order to ensure fairness to Pratt . . . ." According to the majority, this concern was inappropriate because the district court "was free to grant Malev's request without assuming responsibility for supervising [Pratt's] . . . discovery from Malev."

None of these reasons, singly or together, justify reversal of the district court here. With regard to the first, which the majority itself characterizes as "a quasi-exhaustion requirement," the majority suggests that the district court impose the same condition upon remand. Specifically, the majority states that under Fed. R. Civ. P. 26, the district court could require Malev to show that the discovery is " 'not obtainable from some other source . . .'

such as the Hungarian court." If the district judge can impose such a sensible requirement later, why bar it at the outset? "Quasi-exhaustion" may not be written into the statute, but why not require it? The doctrine of exhaustion of remedies is not unknown to judges, cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), and section 1782 seems to be an appropriate instance for utilizing it. Moreover, there is no indication, either in the text or the legislative history of section 1782, that Congress intended the statute to be used for anything other than to provide information necessary to foreign litigation but beyond the power of the foreign court. The district court here did not mechanically require exhaustion. Its decision in this respect turns on Malev's failure to show any need for invoking section 1782.

As for the second reason given by Judge Clarie, I agree with the majority that the statute allows an application to be made by "any interested person," not just by the foreign tribunal. But Judge Clarie did not deny Malev relief because he misapprehended this principle. He denied discovery because there was no showing of need and he was concerned over the burden of involving a Connecticut district court in granting routine discovery for a foreign litigation. His reference to a request from the Hungarian court was clearly meant only to signal that he might reconsider the need for such discovery if asked to by a foreign court.

Finally, the majority's disapproval of the judge's reference to reciprocal discovery is hard to understand. Of course, the statute does not *require* reciprocal discovery and Judge Clarie did not believe that it did. But, in the district court, Malev offered "to engage in reciprocal discovery," obviously to put itself in a more palatable light. Can it seriously be urged, in the face of such an offer, that a United States litigant in a foreign proceeding should be

subjected to United States-style discovery but at the same time obtain only the discovery that the foreign system grants? Fairness, in view of Malev's offer, suggests otherwise. Judge Clarie was absolutely right to be concerned about supervising such discovery and the complications that might ensue. On top of these burdens, the district court will now have to determine the viability of Malev's discovery request in light of the Hungarian court's decision referred to in the majority opinion at note 5.

In sum, Malev seeks to use section 1782 to engage in broad United States-style discovery against its opponent in a foreign litigation, where the party and all the information sought are—by Malev's own concession at oral argument—subject to the process of the foreign court. Malev cites no reported case—and I have found none—in which section 1782 has been used in such circumstances. The section is generally used to seek limited amounts of evidence (commonly bank records) from third parties in this country not subject to the jurisdiction of the foreign court. See, e.g., In re Request for Assistance from Ministry of Legal Affairs, 117 F.R.D. 177, 178 (S.D. Fla. 1987), aff'd, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989); In re Letter of Request for Judicial Assistance, 669 F. Supp. 403, 408 (S.D. Fla. 1987). It is true that in the leading case relied on by Malev—John Deere, Ltd. v. Sperry Corp., 754 F.2d 132, 138 (3d Cir. 1985)—the Third Circuit reversed a district court's denial of discovery pursuant to § 1782 requested by Deere, which was then being sued by Sperry in Canada. But the district court there had relied on impermissible reasons—lack of a reciprocal foreign statute and the inadmissibility at trial of the evidence sought—in denying discovery. Id. Moreover, the main focus of the circuit court's opinion was on Deere's right under § 1782 to obtain the deposition of a Sperry employee after Deere had unsuccessfuly

requested the same relief from the Canadian court. John Deere, 754 F.2d at 137.

Malev's position, in effect, is that section 1782 can be used as a matter of right against party litigants to supplant foreign procedures with discovery under United States rules, supervised by heavily burdened United States courts, any time a litigant is subject to the jurisdiction of this country's courts. I do not believe that this is the law. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 2 91-73X (TEC)

In the Matter of the Application of

MALEV HUNGARIAN AIRLINES

RULING ON MOTION FOR DISCOVERY

Malev Hungarian Airlines ("Malev") has petitioned the Court for an order granting discovery pursuant to 28 U.S.C. § 1782. Malev makes the request as a result of an action brought in Hungary by United Technologies International, Inc., Pratt & Whitney ("Pratt & Whitney") against Malev seeking specific performance of an alleged contract whereby Malev allegedly agreed to purchase in excess of 30 million dollars worth of aircraft engines from Pratt & Whitney. Malev contends that it must avail itself of American discovery mechanisms in order to adequately defend itself against the action brought by Pratt & Whitney in Hungary.

Section 1782(a) states in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . .

The district court entertains wide discretion to grant or deny a request under section 1782. *In re Request for Assistance*

from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1154 (11th Cir.), *cert. denied* 488 U.S. 1005 (1988); *In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea*, 428 F. Supp. 109, 112 (N.D. Cal.), *aff'd* 555 F.2d 720 (1977).

After hearing argument on the matter and a review of the relevant case law, the Court finds Malev's request premature and unnecessary. Malev has never made a formal discovery request upon Pratt & Whitney before the Hungarian court. Counsel for Pratt & Whitney has represented to the Court that it will comply with any order the Hungarian court imposes. The Court is familiar with counsel and has no reason whatsoever to doubt his representations.

Malev makes much of the fact that the Hungarian court has allowed for such a request to be made of this Court. A careful review of the Municipal Court Decision of September 23, 1991, establishes that discovery procedures are fully available to litigants in Hungary and that Malev has failed to pursue the available avenues:

> Defendant has not yet presented its defense on the merits of this case and expressed at the hearing its desire to make a motion with respect to discovery as to certain facts. . . .
>
> In response to this Court's direction, defendant's counsel offered no evidence, but rather stated that defendant had, through its American counsel, commenced a discovery proceeding which, *as is the case with Hungarian discovery mechanisms—has the objective of discovering the parties' positions and the marshalling of evidence.*
>
> *Defendant's counsel accordingly did not request a discovery order pursuant to § 207 of the Hungarian Civil Procedure, but rather disclosed that it had commenced discovery proceedings.*

Municipal Court opinion, at p. 2 (emphasis added). The Court has no reason to doubt that Malev can obtain the relevant information it seeks through Hungarian procedures. This Court's involvement would unnecessarily complicate the

case and bring with it significant reciprocal discovery problems.

Absent a request from the Hungarian court to become involved in the oversight of discovery, Malev's request is DENIED.

SO ORDERED.

Dated this 30th day of September, 1991, at Hartford, Connecticut.

/s/ T. EMMET CLARIE
T. Emmet Clarie
Senior District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed June 26, 1992

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of June one thousand nine hundred and ninety-two.

In the Matter of the Application of

MALEV HUNGARIAN AIRLINES,

Plaintiff.

MALEV HUNGARIAN AIRLINES,

Plaintiff-Appellant,

—v.—

UNITED TECHNOLOGIES INTERNATIONAL INCORPORATED; PRATT & WHITNEY COMMERCIAL ENGINE BUSINESS,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellees, United Technologies International Incorporated and Pratt & Whitney Commercial Engine Business.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE GOLDSMITH
Elaine B. Goldsmith
Clerk

APPENDIX D

[Letterhead of Reid and Riege, P.C.]

May 15, 1992

The Honorable T. Emmet Clarie
Judge, United States District Court
450 Main Street
Hartford, Connecticut 06103

Re: *In the matter of the Petition of*
Malev Hungarian Airlines
Docket No. 2:9100073X (TEC)

Dear Judge Clarie:

I write on behalf of petitioner Malev Hungarian Airlines ("Malev") in the above-captioned matter.

As your Honor is undoubtedly aware, the United States Court of Appeals for the Second Circuit on May 5, 1992, reversed the July 30, 1991 order of the District Court pertaining to discovery pursuant to 28 U.S.C. § 1782, and remanded the matter to this Court for further proceedings.

In accordance with the suggestions of the Court of Appeals in its May 5 opinion, and in the interest of conserving time and resources, we are respectfully advising the Court that Malev intends to submit to the Supreme Court of Hungary a request for leave to submit to the trial court there a discovery plan, describing the types of documents and deposition testimony Malev requres, so as to enable the Hungarian trial court to judge the relevance of the materials we seek. Upon a ruling from the Hungarian trial court, we would then make an application directly to your Honor for the discovery materials judged relevant. We believe that this procedure is not only efficient in focusing the discovery and limiting to the greatest extent this Court's investment of judicial resources, but also addresses the preference expressed earlier by your

Honor that Malev initially involve the Hungarian courts in the discovery process.

Accordingly, it is our present intention to reapply to this Court pursuant to 28 U.S.C. § 1782 when the Hungarian courts have rendered their rulings on Malev's proposed discovery plan.

Respectfully,

REID & RIEGE, P.C.

/s/ NEIL P. COUGHLAN
Neil P. Coughlan

NPC:Barb

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Hartford, Connecticut 06103 and sent by regular mail to
Richard F. Ziegler, Esq.
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Barry H. Garfinkel, Esq.
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